Supreme Court, U.S.
FILED
06-1406 APR 19 2007
OFFICE OF THE CLERK

No. ____

In the
SUPREME COURT OF THE UNITED STATES

KAHANE CHAI, KACH and KAHANE.ORG.

Petitioners,

vs.

DEPARTMENT OF STATE and CONDOLEEZZA RICE, SECRETARY OF STATE,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR WRIT OF CERTIORARI

Samuel A. Abady
(Counsel of Record)
95 Desmond Avenue
Bronxville, New York 10708
(914) 337-7377

QUESTIONS PRESENTED FOR REVIEW

Whether due process requires an evidentiary hearing before an entity can be designated as a "foreign terrorist organization"?

Whether the First Amendment requires an evidentiary hearing before an entity can be designated a "foreign terrorist organization"?

Whether the substantial evidence standard violates due process in the D.C. Circuit's review of the Secretary of State's designation of an entity as a "foreign terrorist organization"?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition. None is a nongovernmental corporation for which a corporate disclosure statement is required under Rule 29(6).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CONTENTS OF APPENDIX iii

TABLE OF CITATIONS iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

Introduction 2

Background and Proceedings Below 4

The D.C. Circuit's Decision 6

REASONS FOR GRANTING THE WRIT 9

The Statutory Scheme 9

Due Process 13

First Amendment 18

CONCLUSION 22

CONTENTS OF THE APPENDIX

Page

Appendix A -- Decision of the United States Court of Appeals for the District of Columbia Circuit, dated and entered October 17, 2006 ... -A1-

Appendix B -- Order *per curium* of the D.C. Circuit, dated and entered January 19, 2007, denying Petition for Rehearing ..... -A20-

Appendix C -- Order *per curium* of the D.C. Circuit, dated and entered January 19, 2007, denying Petition for Rehearing *En Banc* ..... -A21-

TABLE OF AUTHORITIES

FEDERAL CASES

Abrams v. United States, 250 U.S. 616, 630 (1919) .... -19-

Adamo v. U.S., 434 U.S. 275 (1978) ..... -16-

Armstrong v. Manzo, 380 U.S. 545, 522 (1965) ..... -13-

Ass'n of Admin. Law Judges v. FLRA, 397 F.3d 957, 961-15-

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963) . -18-

Brandenberg v. Ohio, 395 U.S. 444 (1969) ..... -21-

Calderon v. Moore, 518 U.S. 149 (1996) ..... -15-

Cohen v. California, 403 U.S. 15 (1971) ..... -22-

Cold War – Dennis v. U.S., 341 U.S. 494 (1951) ..... -21-

Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938) ..... -7-, -9-

Debs v. U.S., 249 U.S. 211 (1919) ..... -19-

Dixon v. U.S. __ U.S. __. 126 S.Ct. 2437, 2439 (2006) . -13-

Estep v. U.S., 327 U.S. 114 (1946) ..... -16-

First Amendment. McKinney v. Alabama," 424 U.S. 669 (1976) ..... -18-

Freedman v. Maryland, 380 U.S. 51 (1965) ..... -18-

Frohwerk v. U.S., 249 U.S. 204, 210 (1919) ..... -19-

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) .. -19-

Gitlow v. New York, 268 U.S. 652 (1925) ..... -20-

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ..... -22-

Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001) .... -17-, -17-, -18-

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) ..... -14-

Iran v. Dep't of State, 373 F.3d 152, 158 (D.C. Cir. 2004)-12-

Kahane Chai, et al v. Dep't of State, 466 F.3d 125 (D.C. Cir. 2006) ..... -1-

LaChance v. Erickson, 522 U.S. 262, 266 (1998) ..... -13-

Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985) ..... -16-

Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ..... -13-

Mills v. Green, 159 U.S. 651, 653 (1895) ..... -16-

Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ..... -13-

National Council of Resistance of Iran v. Department of State, 251 F.3d 192 (D.C. Cir. 2001) ..... -4-, -11-, -18-, -11-, -13-, -14-, -17-

PDK Labs., Inc. v. U.S. Drug Enforcement Admin., 362 F.3d

786, 799 (D.C. Cir. 2004) ..... -15-, -16-

People's Mojahedin Organization of Iran v. Department of State, 182 F.3d 17 (D.C. Cir. 1999)-5-, -7-, -10-, -12-, -7-, -9-

People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1243 (D.C. Cir. 2003) ..... -7-, -16--18-

Rasul v. Bush 542 U.S. 446 (2004) ..... -22-

Richards v. Wisconsin, 520 U.S. 385 (1997) ..... -22-

Staples v. U.S., 511 U.S. 600, 605 (1994) ..... -16-

Touby v. U.S., 500 U.S. 160 (1991) ..... -16-

U.S. v. Ashfari, 426 F.3d 1150 (9th Cir. 2005) ..... -12-

U.S. v. Goba, 240 F. Supp. 2d 242 (W.D. N.Y. 2003) .. -15-

U.S. v. Mendoza-Lopez, 481 U.S. 828 (1987) ..... -16-

U.S. v. Sattar, 272 F.Supp.2d 348 ..... -18-

United States v. Grimaud, 220 U.S. 506, 517 (1911) ... -14-

United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812) . -13-

United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), cert granted, 431 U.S. 937, 97 S.Ct. 2647, 53 L.Ed.2d 254 (1977)-5-

Whitney v. U.S., 274 U.S. 357, 359-60 (1927) ..... -20-

Wilson v. Arkansas, 514 U.S. 927 (1995) ..... -22-

World War I – Schenk v. U.S., 249 U.S. 47 (1919) ..... -19-

Yajus v. U.S., 321 U.S. 414 (1944) ..... -17-

Yates v. U.S., 354 U.S. 298 (1957) ..... -21-

Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975) .... -3-

STATE CASES

People v. Ruthenberg, 229 Mich. 315, 201 N.W. 358 (Mi. 1925), appeal denied, Ruthenberg v. People of State of Michigan, 273 U.S. 782, 47 S.Ct. 470 (Mem) ..... -20-

FEDERAL STATUTES

110 Stat. 3009 ..... -6-

18 U.S.C. 2339B ..... -4-

18 U.S.C. § 2339(B)(g)(6) ..... -13-, -15-, -16-

18 U.S.C. § 2339B(a)(1) ..... -11-, -4-, -16-, -17-

18 U.S.C. § 2339B(a)(2) ..... -3-, -4-

18 U.S.C.A. § 3156(a)(4)(B) ..... -15-

28 U.S.C. § 1254(1) ..... -1-

8 U.S.C. § 1189 ..... -4-

8 U.S.C. § 1189(2)(A)(ii) ..... -11-

8 U.S.C. § 1189(c)(2) ..... -10-

8 U.S.C. § 1189(a)(1) ..... -10-, -15-, -2-, -3-

8 U.S.C. § 1189(a)(4) ..... -11-

8 U.S.C. § 1189(a)(8) ..... -12-

8 U.S.C. § 1189(b)(3) ..... -11-

8 U.S.C. § 1189(C) ..... -11-, -7-

Pub. L. No. 104-208 ..... -6-

FEDERAL REGULATIONS

62 Fed. Reg. 52 ..... -4-

64 Fed. Reg. 55 ..... -4-

66 Fed. Reg. 51 ..... -4-

68 Fed. Reg. 56 ..... -5-

70 Fed. Reg. 4 ..... -6-

OTHER AUTHORITIES

55 Am. U. L. Rev. 785, 804 ..... -21-

Administrative Agencies, 42 Mich. L. Rev. 51, 53 (1943) -14-

George C. Harris, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security, 36 Cornell Int'l L.J. 135, 143 (2003) ..... -10-

Robert Firester & Kendall T. Jones, Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior, 20 Loy. L.A. Ent. L. Rev. 1, 11 (2000) ..... -21-

Mark D. Alexander, Note, Increased Judicial Scrutiny for the Administrative Crime, 77 Cornell L. Rev. 612, 615 (1992) -14-

Randolph N. Jonakait, a Double Due Process Denial: the Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 48 N.Y.L. Sch. L. Rev. 125, 149 (2003-04) ..... -14-, -17-

Thomas E. Crocco, Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites, 23 St. Louis U. Pub. L. Rev. 451, 453 (2004) ..... -19-

Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. Pa. J. Const. L. 1001, 1002-03 (2004) .... -19-

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit dated and entered on October 17, 2006, denying their petition challenging the Secretary of State's designation of them as "foreign terrorist organizations."

OPINIONS BELOW

The opinion is published at *Kahane Chai, et al* v. *Dep't of State*, 466 F.3d 125 (D.C. Cir. 2006) and unofficially reported at 373 U.S.App.D.C. 279. The decision is reprinted in full in the Appendix hereto at A1-A19.

JURISDICTION

The D.C. Circuit, by orders dated and entered on January 19, 2007, denied petitioners' application for rehearing and rehearing *en banc*. Those orders are reprinted in full in the Appendix hereto at A20 and A21.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely under Rule 13)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that: "No person shall be ... deprived of ... liberty, or property, without due process of law."

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech, or .. the right of the people peaceably to assemble ...."

8 U.S.C. § 1189 and 18 U.S.C. 2339B, as more fully detailed herein.

STATEMENT OF THE CASE

A. Introduction.

This case is latest legal battle in the so-called "war on terror." Although long silenced by an al-Qaeda assassin's bullet in 1990, the ghost of Rabbi Meir David Kahane, founder of the militant Jewish Defense League, continues to haunt both the politics of terrorism and the Constitution.

In 1971, Rabbi Kahane emigrated to Israel where he founded the Kach political party. Kach means "thus" in Hebrew, short for a phrase made popular by Vladimir Jabotinsky, one of Israel's founding fathers, "raq kach," in English, "only thus," meaning Jewish national liberation from the scourge of Jew-hatred in Christian and Islamic nations would come about only if the Jews abandoned their historically passive attitude towards physical self-defense and learned the military arts.

Rabbi Kahane was an implacable enemy of Arab and Islamic terrorism which he regarded as fundamentally evil. He believed fervently that Western nations such as the United States, the European states and Israel should be uncompromising in crushing such terrorism. He predicted that, as Arab and Muslim terrorists became more sophisticated, they would develop techniques to engage in

mega-terrorism resulting in mass murder. This was attempted in 1993 World Trade Center bombing which sought to bring down many tower block office buildings in lower Manhattan, and achieved on September 11, 2001, when the World Trade Center complex was destroyed, killing nearly 2,300 innocent men, women and children.

> This is the real struggle: the war of ideas, of values, of civilization.... One does not deal with terrorists; one does not bargain with terrorists; one kills terrorists.... The question is whether the United States has the stomach to defeat terror or whether Americans will sink into what the Rabbis of the Talmud call 'the mercy of fools.' When one refrains from terror against terrorists, he is not better than they. He will be deader, and there is nothing moral of ethical about that. The choice is clear and once again, the Rabbis put it well: "If one comes to slay you, slay him first. (Brachot, 58)"

http://www.kahane.org/meir/usa.htm

In *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), the D.C. Circuit upheld a Fourth Amendment *Bivens* claim by sixteen followers of Rabbi Kahane against the Attorney General and FBI agents for warrantless wiretaps undertaken in the name of national security, *inter alia*, because plaintiffs were not terrorists. In the instant case, the D.C. Circuit thirty years later has upheld the Secretary of State's designation activists animated by the same philosophy now are terrorists.

At issue in this case is whether petitioners,

organizations militantly opposed to terrorism, can be tarred with the stain of being "foreign terrorist organizations" by the Secretary of State – with all the criminal and civil consequences that follow – on mere hearsay represented by four Israeli news reports without any meaningful hearing in which to confront the witnesses and evidence against them, and based on the minimalist "substantial evidence" standard of review, in violation of their due process and fee speech rights.

B. Background And Proceedings Below.

Fern Sidman is a single mother in New York, a journalist who frequently extolls the ideas of Rabbi Kahane and former member of the Jewish Defense League. Ms. Sidman writes for The Judean Voice, *inter alia*, a magazine of Kahanist political commentary published in print and on the Internet.

On September 12, 2003, Ms. Sidman received a letter dated September 3, 2003, from William Pope, Acting Director of Counter-terrorism at the United States Department of State, in which he stated he was providing notice mandated by *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001) that the Secretary of State intended to redesignate certain Jewish organizations named after or inspired by Rabbi Kahane as Foreign Terrorist Organizations ("FTO") under 8 U.S.C. § 1189, including The Judean Voice and petitioners herein. Mr. Pope's letter further advised that Ms. Sidman was entitled to disclosure of all non-secret information on which the Secretary of State supposedly justified designating these Jewish organizations as FTO's. A4.

At the same time, Ms. Sidman was the target of a

grand jury investigation under 18 U.S.C. 2339B which makes it a crime to provide "material support" to an FTO. The crime carries a maximum sentence of fifteen years in prison. Ms. Sidman was subpoenaed to appear before a grand jury in the Eastern District of New York on October 23, 2003, at 10:00 a.m. The subpoena was withdrawn when invoked her Fifth Amendment rights.[1]

Under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the Secretary of State is given authority to designate an entity as an FTO. An entity can challenge such designation by filing a petition directly with the United States Court of Appeals for the District of Columbia Circuit. This is a *sui generus* proceeding: "The statute before us is unique, procedurally and substantively." *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17, 19 (D.C. Cir. 1999).

On October 31, 2003, petitioners filed a petition in the D.C. Circuit challenging their FTO designation. On March 3, 2005, the Secretary of State filed the unclassified portion of the public record with the D.C. Circuit. After much "tooth pulling" by petitioners' counsel below, in 2004, the Secretary of State conducted a *de novo* review of petitioners' FTO designation. Appendix at 2, 5-6 (hereinafter "A__.")

1

In the Second Circuit, persons subpoenaed to testify before a grand jury are entitled to advance notice that they are targets of prosecution. *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert granted*, 431 U.S. 937, 97 S.Ct. 2647, 53 L.Ed.2d 254 (1977), and *cert. dismissed*, 436 U.S. 31, 98 S.Ct. 1873, 56 L.Ed.2d 53 (1978).

Following certain procedural delays, briefs eventually were filed and on September 8, 2006 and the court entertained oral argument. On October 17, 2006, the court issued its decision authored by Chief Judge Ginsberg, and entered judgment, denying the petition to set aside the FTO designation, finding, *inter alia*, that, "based solely upon the unclassified portion of the administrative record," the Secretary of State properly relied on four hearsay Israeli media reports in designating petitioners as FTOs. A7.

On December 1, 2006, petitioners filed petitions for rehearing and rehearing *en banc* which were summarily denied on January 19, 2007.

C. The D.C. Circuit's Decision.

The D.C. Circuit, applying the minimalist "substantial evidence" test for review of administrative agency action, found "substantial support" for the Secretary of State's designation based on four hearsay documents that purported showed that "Kahane Chai threatened an assassination" in Israel:

> (i) a July 1, 2002, radio transcript by Voice of Israel reporting "that death threats had been made against Israeli police officers ... by right-wing extremists" which the Court infers was "an apparent reference to the attempted bombing by right-wing extremists of an Arab school for girls" for which "[a]n activist with ties to Kach was arrested in connection with the bombing"
>
> (ii) a November 3, 2003, article in Ma'ariv, a major Israeli newspaper, reporting that Kach activists had organized demonstrations "to protest the conditions

> of ... [activists] accused of the attempted bombing ... and demanding the head of Shin Bet, Israel's FBI, to "stop abusing Jews";
>
> (iii) a May 28, 2003, Foreign Broadcast Information Service summary of news reports (*i.e.*, double hearsay) "indicating right-wing activists, including members of Kach, had launched a "personal incitement campaign' against then-Prime Minister Sharon"; and
>
> a July 2003, Voice of Israel radio broadcast that Shin Bet Director, Avi Dichter, claimed "there was a threat from ... several dozen Kahanist extremists" on then Prime Minister, Ariel Sharon." A8.

Petitioners argued on the merits that this spare record failed to show that Kahane Chai engaged in assassinations. Stretching the substantial evidence standard to its limit, the D.C. Circuit held the standard satisfied because "Kahane Chai was likely behind such a threat."

> The petitioners apparently assume that if the record does not expressly tie Kahane Chai to a threat of assassination, then the Secretary may not designate it as a FTO on that ground. We do not read "substantial support" so narrowly; rather, the record need provide only a sufficient basis for a reasonable person to conclude that Kahane Chai was likely behind such a threat. *See* PMOI I, 182 F.3d at 25; *cf.* Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938) ("substantial evidence" standard requires "such relevant evidence as a reasonable mind

> might accept as adequate to support a conclusion"). A8-9.

Hence, the D.C. Circuit concluded:

> the Secretary reasonably found Kahane Chai was responsible for the death threats made in 2002 .... The record does not identify any one group as being responsible for the threats, but the evidence suggests Kach was involved in the underlying crime.

And on what basis did the D.C. Circuit endorse the Secretary of State's thinking in this regard? That "Kahane Chai venerates Baruch Goldstein ... who massacred 29 Arab worshipers in Hebron." A9.[2]

---

2 On February 25, 1994, on which the Jewish holiday, Purim fell that year, Baruch Kappel Goldstein, M.D., killed twenty-nine and wounded 125 Arab worshipers at the Mosque of Abraham located adjacent to the Cave of the Patriarchs (in Hebrew, "Me'arat HaMachpela," meaning "Cave of the Double Tombs"). The cave, located in Hebron, is the reputed burial place of four Biblical/Koranic patriarchal couples: (i) Adam and Eve; (ii) Abraham and Sarah; (iii) Isaac and Rebekah; (iv) Jacob and Leah. Goldstein was overwhelmed by surviving worshipers and beaten to death with a fire extinguisher. Goldstein's actions were immediately condemned by the Israeli government and Jewish leaders around the world. Yasser Arafat declared that Goldstein was one of twelve perpetrators involved who threw hand grenades at Muslim worshipers. An Israeli Commission of Inquiry headed by Justice Meir Shamgar,

(continued...)

D. Reasons for Granting the Writ

The Statutory Scheme

---

[2](...continued)
then President of the Israel Supreme Court, which included Associate Justice, Abd el Rahman Zouabi, (the "Shamgar Commission"), heard testimony over thirty-days from 106 witnesses, reviewed 1,140 exhibits, generated 2,200 pages of non-classified material, and issued a 338 page report which concluded no grenade fragments were found or used and Goldstein acted entirely alone.

The Shamgar Commission report revealed that Goldstein had not engaged in an unprovoked act of violence, but instead, a pre-emptive strike against a looming Arab pogrom in Hebron. Specifically, "Goldstein acted to forestall a massacre" at the Cave at which Arab worshipers were chanting "itback al-Yahd," *i.e.*, "slaughter the Jews." Due to the extraordinary number of Arab attacks on Jews, the Commission recommended the Intifada be crushed.

Kahane activist, Michael Guzovsky, featured prominently in the D.C. Circuit's decision, commented immediately after the event that Goldstein "couldn't have picked a better day – Purim, when Jews fight back." In response, the Israeli government outlawed Kach. Middle East Journal, Chronology, vol 48, no 3 (Summer 1994) p511ff. The Israeli government, headed by Yitzhak Rabin, who staked his political life on reaching a settlement with Arafat, responded by banning Kach and Kahane Chai, labeling them as "terrorist organizations." Notably, the Shamgar Commission found that Kach was not involved in Goldstein's act and did not know of his plan. *Id.*

To designate an FTO, the Secretary of State must determine the group: (i) is foreign; (ii) engages in terrorist activity; and (iii) "threatens the security of the United States nationals or the national security of the United States." The statute broadly defines "national security" as "the national defense, foreign relations, or economic interests of the United States...." 8 U.S.C. § 1189(c)(2); A2.

> "Terrorist activity" is broadly defined to include virtually any unlawful use of, or threat to use, a weapon against person or property, unless for mere personal monetary gain. "National security" is also broadly defined to mean "national defense, foreign relations, or economic interests of the United States." In making these findings, the Secretary can use almost any source, including "third hand accounts, press stories, material on the Internet or other hearsay regarding the organization's activities."

George C. Harris, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 36 Cornell Int'l L.J. 135, 143 (2003), citing 8 U.S.C. § 1189(a)(1); 8 U.S.C. § 1182(a)(3)(B)(ii)(V)(b); 8 U.S.C.§ 1189(c)(2); and *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 19 (D.C. Cir. 1999; A2.

Significant for this writ application, under 8 U.S.C. § 1189(a)(1), "terrorist activity" is defined as activity deemed unlawful **under the domestic laws where it occurs** and involves, in pertinent part, threats to use specified weapons to cause death, injury, or property damage. The critical, unresolved issue presented here is whether the D.C. Circuit was required to filter such unlawful activity through the First

Amendment. A3.

An FTO classification lasts for two years, but in fact, last in perpetuity because a group can be redesignated an FTO without limitation on the number of possible redesignations. 8 U.S.C. § 1189(a)(4).

The consequences are severe. By the designation process, the Secretary of State defines criminal activity because, under 18 U.S.C. § 2339B(a)(1), it is a crime to provide "material support or resources" to an FTO or "attempt[ ] or conspire[ ] to do so." The designation statute empowers the Secretary of Treasury to order all United States financial institutions possessing or controlling any of the organization's assets to block any financial transactions by a designated organization before the designation is even published in the Federal Register. A4. 8 U.S.C. § 1189(C) provides: "Upon notification under paragraph (2)(A)(i), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court." The notification referred to is the notice given to the congressional leaders. 8 U.S.C. § 1189(2)(A)(ii).

An FTO designation strips an organization of bank accounts and the ability to function financially within the jurisdiction of the United States. For this reason, the D.C. Circuit concluded that pre-designation notice are required to safeguard constitutionally protected liberty and property interests. *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001); A4.

Congress has circumscribed the D.C. Circuit's scope

of review:

> 8 U.S.C. § 1189(b)(3) states: "The Court shall hold unlawful and set aside a designation the Court finds to be- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (2), or (E) not in accord with the procedures required by law.
>
> [W]e make no judgment as to the accuracy of the information in the record; "our only function is to decide if the Secretary, on the face of things, had enough information before [him] to come to the conclusion that the organizations were foreign and engaged in terrorism." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999). A7.

A defendant charged with providing material support is prohibiting from challenging an FTO designation. 8 U.S.C. § 1189(a)(8); *U.S. v. Ashfari*, 426 F.3d 1150 (9th Cir. 2005), *reh. and reh. en banc denied*, 446 F.3d 915 (9th Cir., 2006), *cert denied*, 127 S.Ct. 930, 166 L.Ed.2d 702 (2007)..

The D.C. Circuit "is directed to set aside the designation for the ordinary administrative law reasons, such as that the designation is "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. The court must also set aside a designation for several other reasons, including that the designation is "contrary to constitutional right, power, privilege, or immunity." *Id.* at 1154. "The statutory phrase 'terrorist organization' is a term of art, defined by Congress as 'an organization designated as a terrorist organization;" under 8 U.S.C. § 1189(a)(1). *Id.* at 1155, citing 18 U.S.C. § 2339(B)(g)(6).

Due Process

Although due process is elastic, *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."), its core requirements are clear: "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 522 (1965); *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). ("The core of due process is the right to notice and a meaningful opportunity to be heard.").

The statutory procedure before the D.C. Circuit does not include the right to hearing at which evidence may be subpoenaed and witnesses subjected to cross examination. Absent an evidentiary hearing at which to challenge the four hearsay media reports upon which they were designated as FTOs, and upon which their members can be prosecuted under 2339B, petitioners have been denied due process.

In addition, the statute improperly delegates defining criminal law to the Secretary of State because designated FTOs have no meaningful hearing at which to adduce

evidence to refute the Secretary's actions. There are no common law federal crimes. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *Dixon v. U.S.* __ U.S. __, 126 S.Ct. 2437, 2439 (2006) ("federal crimes are 'solely creatures of statute,'" citing *Liparota v. United States*, 471 U.S. 419, 424 (1985)). Hence, the statutory scheme improperly permits the Secretary of State to define the crucial predicate for violation of 2339B by his FTO designation power. Such delegation is unconstitutional in this case because:

> Just as a criminal 'law' cannot be used to prosecute an accused if Congress adopted the provision by unconstitutional procedures, Congress cannot create crimes by mandating that others use unconstitutional procedures to create an element of a crime. Congress can delegate to others, but it cannot delegate what it does not have, the power to act unconstitutionally.

Randolph N. Jonakait, *a Double Due Process Denial: the Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations*, 48 N.Y.L. Sch. L. Rev. 125, 149 (2003-04); *see* *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *see*, Mark D. Alexander, Note, *Increased Judicial Scrutiny for the Administrative Crime*, 77 Cornell L. Rev. 612, 615 (1992) ("only the legislature could creates crimes in the federal government."); *see also* Edmund H. Schwenk, *The Administrative Crime, Its Creation and Punishment by Administrative Agencies*, 42 Mich. L. Rev. 51, 53 (1943) ("There are no common-law crimes within the areas of the federal government.... Hence if an act is to constitute a crime, it must be created by statute, and by a statute only.").

As the Ninth Circuit observed:

> "The statutory phrase 'terrorist organization' is a term of art, defined by Congress as 'an organization designated as a terrorist organization;" under 8 U.S.C. § 1189(a)(1). ... Congress was well aware that some might claim that 'one man's terrorist is another man's freedom fighter.' Congress clearly chose to delegate policymaking authority to the President and Department of State with respect to designation of terrorist organizations, and to keep such policymaking authority out of the hands of United States Attorneys and juries. Under § 2339B, if defendants provide material support for an organization that has been designated a terrorist organization under § 1189, they commit the crime, and it does not matter whether the designation is correct or not." *Id.* at 1155-56, citing 18 U.S.C. § 2339(B)(g)(6)..[3]

Hence,

---

[3] This acknowledgment conflicts with the holding in *U.S. v. Goba*, 240 F. Supp. 2d 242 (W.D. N.Y. 2003) that 2339B is a "crime of violence" under the Bail Reform Act, 18 U.S.C.A. § 3156(a)(4)(B), thus justifying their pretrial detention of defendants charged with providing material support to an FTO.

> The question is not just whether the Secretary made the designation, and it is not whether the Secretary made proper policy choices in designating an organization. Instead, the issue is the constitutionality of the procedures to create an element of the crime, for a person can only be constitutionally convicted if a crime has been validly created.

Jonakait, *id.*

Further, to the extent that the D.C. Circuit endorses the Secretary of State's FTO designation, it, too, is directly involved in defining the core element of a 2339B prosecution. "As we observed in *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples v. U.S.*, 511 U.S. 600, 605 (1994); *Dowling v. U.S.* 473 U.S. 207, 213 (1985) (because federal crimes are "creatures of statute ... when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids.")

This Court previously held that judicial review is available to a defendant charged with violating a crime defined by Executive Branch officials. *Estep v. U.S.*, 327 U.S. 114 (1946) (violation of Selective Service regulations); *Adamo v. U.S.*, 434 U.S. 275 (1978) (violation of Environmental Protection Agency standards regarding "emissions"); *Touby v. U.S.*, 500 U.S. 160 (1991) (violation of Controlled Substances Act based on scheduling of substance by the Attorney General); *U.S. v. Mendoza-Lopez*,

481 U.S. 828 (1987) (due process violated by alien convicted of re-entering the United States following deportation because "deportation is used to establish an element of the offense").

> It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them. Once it is held that Congress can require the court criminally to enforce unconstitutional laws or statutes, including regulations, or to do so without regard for their validity, the way will have been found to circumvent the supreme law and, what is more, to make the court parties to doing so. . . . But whenever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it. The problem therefore is not solely one of individual right or due process of law. It is equally one of the separation and independence of the powers and of the constitutional integrity of the judicial process, more especially in criminal trials.

Yajus v. U.S., 321 U.S. 414 (1944) (Rutledge, dissenting); *see, Jonakait, supra* at 166: "The statutory scheme should be amended to furnish a constitutionally sufficient notice to all organizations when the Secretary determines that a designation may be imminent. These organizations should then be afforded a reasonable but limited time for a

meaningful hearing."

In *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000), *cert. denied*, 532 U.S. 904 (2001), plaintiffs sought injunctive relief in the enforcement of § 2339B for fear that their legitimate humanitarian activities would be criminalized by application of the statute. The Ninth Circuit squarely rejected a constitutional challenge to the "material support or resources" prohibition of § 2339B, noting that the statute does "not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group," but instead, "the act of giving material support."[4] But it is no crime to donate funds to a terrorist group. Citizens are free to financially support the world's most infamous terrorist organization, the Palestine Liberation Organization. Instead, it is a crime to support a designated FTO.

The entire statutory scheme violates due process because it forecloses meaningful judicial review, either to FTOs, or to their members or others prosecuted under 2339B.

First Amendment

The statutory is additionally unconstitutional because this Court has previously determined that criminal defendants, or in the instant case, prospective criminal defendants like Ms. Sidman affiliated with a designated FTO,

---

[4] Compare *U.S. v. Sattar*, 272 F.Supp.2d 348 (S.D. N.Y. 2003) (holding that conspiracy and related substantive offense of providing material support or resources to FTO was unconstitutionally vague regarding the statute's prohibition on "providing" material support or resources in the form of "communications equipment" and "personnel;" by criminalizing the mere use of phones and other means of communication).

are entitled to demonstrate their conduct is protected by the First Amendment. *McKinney v. Alabama,*" 424 U.S. 669 (1976); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) Yet, a designated FTO has no right to confront the Secretary of State's sources, no meaningful ability to confront "third hand accounts, press stories, material on the internet or other hearsay regarding the organization's activities. " *PMOI II*, 251 F.3d at 196 (quoting *PMOI I*, 182 F.3d at 19).

Even if the Secretary of State deems Rabbi Kahane's ideas repugnant, in the realm of free speech, "there is no such thing as a false idea," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), including those of Rabbi Kahane. *See*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (contending that the First Amendment requires tolerance of speech even when it is "fraught with death"); Thomas E. Crocco, *Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites*, 23 St. Louis U. Pub. L. Rev. 451, 453 (2004) ("[S]peech that contributes to the free exchange of diverse ideas is constitutionally welcome, no matter how unpopular, misguided, or repugnant it is perceived to be.)

There is no doubt that war and feelings of national peril have a direct impact on the First Amendment. World War I – *Schenk v. U.S.*, 249 U.S. 47 (1919) (upholding conviction under Espionage Act of 1917, and articulating the "clear and present danger" test); *Frohwerk v. U.S.*, 249 U.S. 204, 210 (1919) (upholding publisher's conviction for conspiring to cause disloyalty, mutiny, and refusal of duty in the military by opposing war against Germany); *Debs v. U.S.*, 249 U.S. 211 (1919) (upholding conviction of socialist

leader, Eugene V. Debs under the Espionage Act);[5] *Abrams v. U.S.*, 250 U.S. 616, 627 (1920) (affirming conviction of Russian émigrés who distributed leaflets critical of the American intervention in the Russian Revolution); *Gitlow v. New York*, 268 U.S. 652 (1925) (upholding power of Congress to restrict words which "by their very nature, involve danger to the public peace and to the security of the state."); *Whitney v. U.S.*, 274 U.S. 357, 359-60 (1927) (upholding statute which punished those who participate in "criminal syndicalism" defined as "advocating... the commission of crime, sabotage... or unlawful methods of terrorism as a means of accomplishing industrial or political reform"); *People v. Ruthenberg*, 229 Mich. 315, 201 N.W. 358 (Mi. 1925), *appeal denied*, Ruthenberg v. People of State of Michigan, 273 U.S. 782, 47 S.Ct. 470 (Mem) (1927) (declaring, in effect that, under Criminal Syndicalism Statute, communists have no First Amendment rights, The Cold War – *Dennis v. U.S.*, 341 U.S. 494 (1951) (affirming conviction under the Smith Act of general secretary of the Communist Party-U.S.A). The Vietnam War – *United States v. O'Brien* (1968) (rejecting the burning of draft cards as act of free speech).

---

5 Eventually, more than 2,000 people were prosecuted for "insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States," and imprisoned for up to twenty years, under the Espionage Act which was passed to blunt criticism of World War I when President Woodrow Wilson, after declaring U.S. neutrality in 1914, led a deeply divided nation into war three years later. During Palmer Raids of late 1919 and early 1920, 10,000 persons were arrested on suspicion they were radicals. http://historymatters.gmu.edu/d/4993

But First Amendment jurisprudence evolved. In Yates v. U.S., 354 U.S. 298 (1957), this Court effectively nullified the Smith Act and held that mere "advocacy and teaching of forcible overthrow as an abstract principle" was protected speech.

In 1969, this Court finally swept away the World War I and Cold War cases in its seminal decision in *Brandenberg v. Ohio*, 395 U.S. 444 (1969) which expressly overruled *Whitney*. In *Brandenberg*, this Court created the "imminence" test that advocacy of ideas must "produc[e] imminent lawless action and is likely to incite or produce such action" before such advocacy can be outlawed. *Id.* at 446-47. Thus, the Court protected a Ku Klux Klan speaker's right to exhort his audience to "[s]end the Jews back to Israel." Robert Firester & Kendall T. Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 Loy. L.A. Ent. L. Rev. 1, 11 (2000) (arguing that "[o]nly when violent acts are so imminent [that] there is no time for response and discussion and thus no chance for the truth to prevail can speech be suppressed"). Thus, "Brandenburg represented the unencumbered adoption of a temporal analysis to determine whether speech posed a risk of imminent harm." Robert S. Tanenbaum, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 Am. U. L. Rev. 785, 804.

After the tide of public opinion turned against the Vietnam War, this Court retreated from *O'Brien*. *Tinker v. Des Moines Independent Community School District* (1969) (upholding right of students to wear anti-war, black arm-bands as "symbolic speech"); *Cohen v. California*, 403 U.S. 15 (1971) (upholding right of war protester to wear jacket emblazoned with "Fuck the Draft" in L.A. County Courthouse).

Likewise, before the horrific terrorist attacks of September 11, 2001, due process regarding pre-action notice and a meaningful post-action hearing were reinforced. *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Richards v. Wisconsin*, 520 U.S. 385 (1997)) (targets of search warrants must be given contemporaneous notice save for exceptional circumstances); *Rasul v. Bush* 542 U.S. 446 (2004) and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (due process requires that person held as enemy combatant be given meaningful opportunity to contest factual basis for his detention by habeas corpus).

Each of the four media reports on which the D.C. Circuit upheld the Secretary of State's FTO designation in this case describe clearly protected activity under *Brandenberg*. Hence, this Court should grant certiorari to announce that activity deemed unlawful abroad must nonetheless be scrutinized under the First Amendment, and declare that otherwise constitutionally protected speech may not for the predicate for an FTO designation.

CONCLUSION

Terrorism is so broadly defined that militantly anti-terrorist, Jewish groups on the State Department's list are deemed FTOs. The consequence is that advocacy of controversial ideas has been criminalized, and law abiding anti-terrorist citizens like Fern Sidman are equated with villains like Khaled Sheik Mohammed or Osama bin Laden without any meaningful hearing to challenge the FTO designation or any standard of review that protects vital due process and First Amendment rights.

A label which covers anyone covers no one. If anti-terrorist groups can be officially labeled as "terrorists," with

the dire criminal consequences that follow, then virtually anyone can be deemed a terrorist, and the force behind the term is forever lost. The D.C. Circuit's inability to hold an evidentiary hearing, and its failure to hold the State Department to a higher standard of review represents a vital blow both to civil liberties and our war on terrorism.

Accordingly, certiorari should be granted.

Respectfully submitted

Samuel A. Abady
(Counsel of Record)
95 Desmond Avenue
Bronxville, New York 10708
(914) 337-7377

APPENDIX

APPENDIX A – DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND ENTERED OCTOBER 17, 2006

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 8, 2006 – Decided October 17, 2006

No. 03-1392

KAHANE CHAI, ET AL.,

Petitioners

vs.

DEPARTMENT OF STATE AND CONDOLEEZZA RICE, SECRETARY OF STATE,

Respondents.

On Petition for Review of an Order of the Secretary of State

Kenneth Klein argued the cause and filed the briefs for petitioners.

Douglas N. Letter, Terrorism Litigation Counsel, U.S. Department of Justice, argued the cause for respondent. With him on the brief were Peter D. Keisler, Assistant

Attorney General, and Mark S. Davies, Attorney.

Before: GINSBURG, Chief Judge, and SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Chief Judge GINSBURG.

GINSBURG, Chief Judge: In October 2003 Secretary of State Colin Powell redesignated Kahane Chai as a Foreign Terrorist Organization (FTO), redesignated Kach as an alias of Kahane Chai, and newly designated Kahane.org as an alias of Kahane Chai. After a de novo reconsideration in 2004, the Secretary reaffirmed all three designations. The three entities now petition for revocation of the 2003 designations. We conclude the designations complied with applicable statutory and constitutional requirements and, accordingly, we deny the petition.

I. Background

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) authorizes the Secretary of State to designate an entity as a FTO if the Secretary finds:

> (A) the organization is a foreign organization;
> (B) the organization engages in terrorist activity ... or retains the capability and intent to engage in terrorist activity or terrorism[]; and
> (C) the terrorist activity or terrorism of the organization
> threatens the security of United States nationals or the national security of the United States.

8 U.S.C. § 1189(a)(1). "Terrorist activity" is defined, in

relevant part, as

> any activity which is unlawful under the laws of the place where it is committed ... and which involves any of the following:
>
> (IV) An assassination.
>
> (V) The use of any –
>
> (a) biological agent, chemical agent, or nuclear weapon or device, or
> (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),
>
> with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) A threat, attempt, or conspiracy to do any of the foregoing.

Id. § 1182(a)(3)(B)(iii). To "engage in terrorist activity" includes, among other acts," solicit[ing] funds or other things of value for – (aa) a terrorist activity [or] (bb) a terrorist organization." *Id.* § 1182(a)(3)(B)(iv).

Designation as a FTO has three main consequences: (1) "Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization ... has an interest shall ... retain possession of, or maintain control over such funds," 18 U.S.C. § 2339B(a)(2); (2) "Any alien who ... is a representative ... of ... a terrorist

organization,ö 8 U.S.C. § 1182(a)(3)(B)(i), is "ineligible to receive visas and ineligible to be admitted to the United States," *id.* § 1182(a); (3) and it becomes a crime to "knowingly provide[] material support or resources to [the] foreign terrorist organization, or attempt[] or conspire[] to do so," 18 U.S.C. § 2339B(a)(1).

Kach and Kahane Chai, organizations the stated purpose of which is to restore the biblical state of Israel, were declared terrorist organizations by the Israeli Cabinet in 1994 pursuant to Israel's 1948 Terrorism Law. The Secretary of State first designated Kahane Chai and Kach as FTOs in 1997, Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650 (Oct. 8), and redesignated them as such in 1999, Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112, 55,112 (Oct. 8), and 2001, Redesignation of Foreign Terrorist Organizations, 66 Fed. Reg. 51,088, 51,089 (Oct. 5). In 2001 the Secretary also designated Kach and 16 other organizations as aliases of Kahane Chai. *Id.* Neither Kahane Chai nor any of its aliases sought judicial review of any of these designations.

On September 3, 2003 the Department of State wrote letters to five persons it thought "might represent" Kahane Chai stating that the Secretary proposed to redesignate Kahane Chai, Kach, and Kahane Chai's other aliases as FTOs. The notice stated that the unclassified portion of the administrative record before the Department would be provided to any representative of Kahane Chai or of an alias who so requested within ten days from receipt thereof; the representative would have 15 days from receipt of the record to submit a response.

On September 16 Samuel Abady, Esq. sent a letter in which he identified himself as counsel to one of the

addressees of the September 3 notice; noted his response was timely; conveyed his client's position that Kahane Chai, Kach, and the other presumed aliases were "legitimate, Jewish activist organizations ... not one of [which] practices, supports or advocates terrorism"; and demanded disclosure of the administrative record. The Department of State deemed the letter defective because it did not say Mr. Abady was requesting the record "as a representative of Kahane Chai or one of its aliases." On October 1 Kenneth Klein, Esq. sent a letter to the Department in which he identified himself as the attorney for a representative of Kach and requested the record, but the Department deemed his letter untimely.

On October 2, 2003 Secretary of State Colin Powell redesignated Kahane Chai as a FTO and Kach and 16 others as aliases of Kahane Chai. Redesignation of Foreign Terrorist Organizations, 68 Fed. Reg. 56,860, 56,861. At the same time the Secretary newly designated 20 more entities as aliases of Kahane Chai, including Kahane.org, newkach.org, Kahane.net, and Kahanetzadak.com. *Id.* Drawing upon both classified and unclassified information, the Secretary concluded that Kahane Chai engaged in terrorist activity by (1) using explosives or firearms with intent to endanger the safety of individuals or cause substantial damage to property, (2) threatening and conspiring to carry out assassinations, and (3) soliciting funds and members for a terrorist organization. The Secretary also concluded that Kahane Chai retains the capability and intent to engage in terrorist activity.

After the petitioners had filed for judicial review of the Secretary's decision, the State Department agreed to provide Mr. Klein and Mr. Abady, as representatives of Kahane Chai, with the unclassified portion of the administrative record, to accept relevant submissions for

inclusion in the record, and to make a *de novo* decision on redesignation. In 2004, the Secretary conducted the de novo review and concluded that, although the record included conflicting information on many of the bombings previously attributed to Kahane Chai, the rest of the record supported its redesignation. The Secretary also concluded that Kahane.net was no longer an alias of Kahane Chai and revoked its designation as a FTO, but left in place all other designations as aliases of Kahane Chai. Foreign Terrorists and Terrorist Organizations, 70 Fed. Reg. 4,186 (Jan. 28, 2005).

II. Analysis

The three petitioners, in a joint brief, raise both statutory and constitutional objections to their designations. First, they argue the designations were made without substantial support in the administrative record. Second, they contend the State Department's refusal to provide them with the administrative record prior to the 2003 designations denied them due process, in violation of the Fifth Amendment to the Constitution of the United States. Third, the petitioners allege that designating a website as a FTO violates the First Amendment to the Constitution. Finally, the petitioners contend the State Department discriminated upon the basis of religion because it designated as FTOs the websites only of Jewish organizations.

A. Statutory Claims

Our standard of review is deferential. Under the AEDPA (as amended by Pub. L. No. 104-208, ° 356, 110 Stat. 3009, 3009-644 (1996)) we are to set aside the Secretary's designation of a FTO only if that designation was

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

> with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
> (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court ... or
> (E) not in accord with the procedures required by law.

8 U.S.C. § 1189(c). Our review is to be "based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation." *Id.* Moreover, we make no judgment as to the accuracy of the information in the record; "our only function is to decide if the Secretary, on the face of things, had enough information before [him] to come to the conclusion that the organizations were foreign and engaged in terrorism." *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 25 (D.C. Cir. 1999) (PMOI I).

The petitioners challenge as a denial of due process the Secretary's use of classified information in designating them FTOs. We need not resolve that claim, however, for in this case we can uphold the designations based solely upon the unclassified portion of the administrative record. See People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1243 (D.C. Cir. 2003) (PMOI II); *Id.* at 1245 (Edwards, J.concurring).

1. Redesignation of Kahane Chai as a FTO

The petitioners assert the Secretary's finding Kahane Chai threatened an assassination is based upon a faulty interpretation of the record. In response, the Department notes the Secretary based his conclusion upon four documents. The first is a transcript of a July 1, 2002 radio broadcast by the Jerusalem Voice of Israel Network reporting that death threats had been made against Israeli police officers investigating the "Jewish terrorist squad case," an apparent reference to the attempted bombing by right-wing extremists of an Arab school for girls. An activist with ties to Kach was arrested in connection with the bombing. The second document is an article in the November 3, 2003 newspaper MaÆariv reporting that Kach activists had organized demonstrations near the house of "one of the heads" of the Jewish Affairs Division of the Shin Bet (General Security Service) to protest the conditions of the detained members of the "Jewish terrorist squad"accused of the attempted bombing. The protestors had sprayed graffiti spelling out the official's name (the publication of which was banned), and demanding he "stop abusing Jews." The official's wife is quoted as saying, "Our family is facing harassment and threats." The third document is a May 28, 2003 summary by the Foreign Broadcast Information Service (FBIS) of news reports indicating right-wing activists, including members of Kach, had launched a "personal incitement campaign" against then-Prime Minister Sharon. The fourth document summarizes a July 2003 radio broadcast by the Jerusalem Voice of Israel Network reporting that "Shin Bet Director Dichter said ... the threat to the life of Prime Minister Sharon had grown" and "there was a threat from ... several dozen Kahanist extremists." The Secretary held these four documents sufficient evidence to support the redesignation of Kahane Chai and we agree.

The petitioners apparently assume that if the record

does not expressly tie Kahane Chai to a threat of assassination, then the Secretary may not designate it as a FTO on that ground. We do not read "substantial support" so narrowly; rather, the record need provide only a sufficient basis for a reasonable person to conclude that Kahane Chai was likely behind such a threat. *See* PMOI I, 182 F.3d at 25; *cf.* Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) ("substantial evidence" standard requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

In this case the record indicates – and the petitioners do not deny – that Kahane Chai venerates Baruch Goldstein because he massacred 29 Arab worshippers at the Al-Haram Al-Ibrahimi (Sanctuary of Abraham) or Tomb of the Patriarchs in Hebron. Following the attack Kahane Chai issued a statement calling Goldstein a "hero" and in 2002 its alter ego Kach went so far as to advertise a summer camp for children the program of which included "a pilgrimage to [Goldstein's] grave." Kahane Chai's glorification of the murderous Goldstein, though hardly dispositive, surely makes more credible the evidence supporting the organization's involvement in threats of assassination.

With this in mind, the Secretary reasonably found Kahane Chai was responsible for the death threats made in 2002 against the police officers investigating the Jewish terrorist squad case. The record does not identify any one group as being responsible for the threats, but the evidence suggests Kach was involved in the underlying crime. A man described in a cable from the American Consulate in Jerusalem to the Secretary of State as "a leader" of Kach – which is to say, Kahane Chai – was "reportedly arrested in connection with the attempted bombing." Clearly, Kach/Kahane Chai took a strong interest in the affair,

as indicated by the demonstrations at the home of the Shin Bet official. Surely the Secretary could reasonably conclude that an organization (1) known to approve of terrorist tactics, including the mass murder of Arab worshippers, (2) possibly linked to the attempted bombing of an Arab school, and (3) demonstrably interested in the latter affair, was responsible for the death threats made against the officers investigating that crime. (Kahane Chai does not argue that death threats against police officers are not threats of assassination and we therefore take the point as conceded.)

Finally, the Secretary reasonably found Kahane Chai had threatened the life of then-Prime Minister Sharon. Shin Bet Director Avi Dichter warned of an increased threat to Sharon's life based upon comments from both "right-wing Jewish extremists and Palestinian terrorist organizations,ö including among the former "several dozen Kahanist extremists." The petitioners claim not all Kahanists are members of Kahane Chai and therefore argue the alleged threat cannot be linked to Kahane Chai. The record provides some support for the petitioners' point about membership, but we do not invalidate a designation simply because it is logically possible that the Secretary's conclusion might be wrong. Rather, our task is to determine whether there is in the record substantial support for the Secretary's conclusion. And there is: The Shin Bet Director clearly identified a threat from "Kahanist extremists" and the Secretary could reasonably infer that a Kahanist extremist is likely a member of Kahane Chai.

Upon the basis of the foregoing analysis, we conclude the Secretary's redesignation of Kahane Chai as a FTO has substantial support in the record. Therefore, we consider neither the Department's other evidence in support of this redesignation nor Kahane Chai's objections thereto.

2. Designation of Kach and Kahane.org

When a FTO is known by another name, the organization may be designated a FTO under that name as well. *See* Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 200 (D.C. Cir. 2001) (NCRI I) ("If the Secretary has the power to work those dire consequences [associated with designation] on an entity calling itself 'Organization A,' the Secretary must be able to work the same consequences on the same entity while it calls itself 'Organization B'"). The petitioners contend the Secretary's redesignation of Kach as an alias of Kahane Chai lacks substantial support in the record. In response, the Government points both to a report by the Center for Defense Information stating that the groups have "an overlapping membership of several dozen core members," and to Kahane Chai leader Michael Guzofsky's public statement, quoted in the New York Times, that "if we can't be KACH or Kahane Chai we will be simply Kahane." In addition, the declaration of Kenneth Piernick, then the Acting Chief of International Terrorism Operations Section II, Counterterrorism Division, Federal Bureau of Investigation, states that "the principal US members of Kahane Chai/KACH have consistently" changed the names of their organization in an attempt to evade legal responsibility for their actions.

This evidence provides substantial support for the Secretary's redesignation of Kach as an alias of Kahane Chai. The organizations protest that they are distinct because, as Mr Piernick himself attests, Kahane Chai was formed at the instance of Guzofsky and others "who believed that KACH was not taking a strong enough stand against the Arabs." That was in 1990, however. As the Department correctly pointed out in the analysis it prepared for the Secretary of the

materials submitted by counsel for the petitioners, "separate groups with overlapping membership and similar goals may effectively merge and become one organization" over time. Tellingly, the petitioners did not present any evidence to suggest the two organizations, although apparently different in 1990, were still separate and distinct in 2003 or 2004.

The petitioners also claim the Secretary's designation of Kahane.org as a FTO lacks substantial support. Under the AEDPA, if a FTO "so dominates and controls" an entity that "the latter can no longer be considered meaningfully independent from the former," *Nat'l Council of Resistance of Iran v. Dep't of State*, 373 F.3d 152, 158 (D.C. Cir. 2004) (NCRI II), then the controlled entity may be deemed a FTO.****** A weaker principal-agent relationship may be sufficient as well. *See id.*

The record contains an analysis of Kahane.org by the FBIS concluding "there is little difference between the agendas and the websites" of Kach and Kahane Chai on the one hand and those of Kahane.org on the other. This conclusion was based upon an analysis of the website's "content, design, and hyperlinks." The report also identifies Kahane.org's "billing contact" as Michael Guzovsky – a leader, as we have seen, of Kahane Chai, and one who believed a change of name was just the thing to evade responsibility.

---

* In *NCRI II* we referred to this test as the requirement for designation as an alias of a FTO. 373 F.3d at 158. Because there is a difference between an alias of a FTO, that is, a different name for the same organization, and an entity that is not meaningfully independent of a FTO, for clarity we describe the latter as a "controlled entity."

Kahane.org argues the analysis by the FBIS does not provide substantial support for its designation as a controlled entity of Kahane Chai because "many organizations that have similar ideologies and interests have common links and sometimes have similar layouts in their web pages." Again this argument rests upon the mistaken premise that substantial support means conclusive proof. On the contrary, the Secretary is not obliged to negate every exculpatory possibility raised by a candidate for designation as a FTO. He may, that is, adduce substantial support for a conclusion that, if all the facts were known, might be erroneous.

In this case, the identification of Guzofsky, the chameleon-like leader of Kahane Chai, as the billing contact for Kahane.org, in combination with the similarity of the website's agenda to that of Kahane Chai, provides substantial support for the conclusion that Kahane.org is not "meaningfully independent" of Kahane Chai. We therefore hold the Secretary had sufficient information before him to conclude that Kach is an alias and Kahane.org is a controlled entity of Kahane Chai.

B. Due Process

An organization with a sufficient connection to the United States has the right to be heard "at a meaningful time and in a meaningful manner," *NCRI I*, 251 F.3d at 208 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)), before being deprived of a protected interest in liberty or property. Consequently, unless it makes a showing of particularized need not to do so, *Id.* at 208, the Government must notify such an organization of its impending designation as a FTO and of the unclassified items upon which the Government proposes to base that designation. *Id.* at 208-09. Furthermore, the organization must be given an

opportunity to present in written form such evidence as it can to rebut the evidence in the record or otherwise to fend off its impending designation. *Id.* at 209.

The present petitioners were not given access to the administrative record before they were designated or redesignated FTOs in 2003. The Government defends this omission on the grounds that the Abady letter did not indicate it was written on behalf of a representative of Kahane Chai or an alias thereof and the Klein letter was received too late. The petitioners respond that, although Abady did not expressly say he was acting on behalf of a representative of Kahane Chai, he did say he wrote as counsel for a named individual who, as State must have known, was one of the addressees of the notice the Department sent to persons it thought "might represent" Kahane Chai, and in the circumstances that was sufficient. Moreover, they point out that the notice did not indicate Kahane.org was under consideration for designation as a FTO.

We do not resolve the petitioners' claims of procedural error because the alleged errors were, in the particular circumstances of this case, clearly rendered harmless. In response to the petitioners' procedural objections, the Government offered to do and in 2004 did a *de novo* determination of their status. This time the petitioners were provided, and took full advantage of, the opportunity to inspect and to supplement the record upon which the review would be based.* The result was the same

---

* The 2004 record appears to differ from the 2003 record only by the addition of the petitioners' responses and deletion of the materials, previously incorporated by

(continued...)

as in 2003 -- all three petitioners were designated or redesignated FTOs – and the petitioners have not challenged the 2004 review. It follows apodictically that providing the petitioners with the administrative record prior to the 2003 designation would have had no effect upon the outcome of which they now complain.

The petitioners nonetheless claim the procedures used in the 2003 review harmed them because the Department's subsequent agreement to do a *de novo* review caused a delay in filing the administrative record, and thereby delayed their opportunity for judicial review. Even if true, however, the point is irrelevant. An error is harmless if it was not material to the outcome of the proceeding. *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004). The outcome of the 2004 review, which was unaffected by any allegedly defective procedure, shows the outcome of the 2003 review would not have been different if the Government had provided the petitioners with the record and an opportunity to present evidence in 2003.**

(...continued)
reference, from the 1997, 1999, and 2001 designation and redesignation proceedings against Kahane Chai.

** The petitioners' due process objection also suggests a question of mootness and therefore of our jurisdiction. Although neither party has raised the issue, the court is obliged nonetheless to determine that it has jurisdiction. *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 961 n.* (D.C. Cir. 2005). As the Supreme Court explained in *Calderon v. Moore*, 518 U.S. 149 (1996), "[A]n appeal should ... be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any

(continued...)

C. Free Speech

(...continued)
effectual relief whatever' in favor of the appellant."' *Id.* at 150 (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). In the present case the question is whether the 2004 based.* The result was the same as in 2003 — all three petitioners were designated or redesignated FTOs — and the petitioners have not challenged the 2004 review. It follows apodictically that providing the petitioners with the administrative record prior to the 2003 designation would have had no effect upon the outcome of which they now complain. The petitioners nonetheless claim the procedures used in the 2003 review harmed them because the Department's subsequent agreement to do a *de novo* review caused a delay in filing the administrative record, and thereby delayed their opportunity for judicial review. Even if true, however, the point is irrelevant. An error is harmless if it was not material to the outcome of the proceeding. *PDK Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004). The outcome of the 2004 review, which was unaffected by any allegedly defective procedure, shows the outcome of the 2003 review would not have been different if the Government had provided the petitioners with the record and an opportunity to present evidence in 2003.designation is an intervening event that forecloses relief from the 2003 designation. We think not. The possibility of prosecution pursuant to 18 U.S.C. § 2339B(a)(1) of any individual who knowingly gave material support to Kahane Chai or any of its designated aliases during the time between the 2003 and 2004 reviews is a collateral consequence that creates an exception to the mootness doctrine. *PMOI II*, 327 F.3d at 1244 n.2.

The petitioners argue that designating Kahane.org a FTO violates the First Amendment because the website is a "medium of free speech"; it "expresses a viewpoint, [b]ut it does not advocate terror." As the Government points out, however, and as we have held, the AEDPA does not purport to restrain speech; the statute "is not aimed at interfering with the expressive component of [an organization's] conduct." PMOI II, 327 F.3d at 1244 (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000)). Instead, the focus is upon the nonexpressive component of the organization's conduct, *see id.*, and the Government clearly may restrain such conduct when it facilitates terrorist activity. See Humanitarian Law, 205 F.3d at 1134-35 ("While the First Amendment protects the expressive component of seeking and donating funds, expressive conduct receives significantly less protection than pure speech").

Kahane.org has been designated a controlled entity of Kahane Chai and we have upheld that designation. A restraint upon the conduct of Kahane.org is therefore tantamount to a restraint upon the conduct of Kahane Chai itself. *See NCRI I*, 251 F.3d at 200. And it is established that the restraints imposed upon a FTO by the AEDPA – namely the organization's loss of access to funds held by financial institutions subject to United States law, the inability of alien representatives of the FTO to receive visas or enter the United States, and the prohibition upon designation is an intervening event that forecloses relief from the 2003 designation. We think not. The possibility of prosecution pursuant to 18 U.S.C. § 2339B(a)(1) of any individual who knowingly gave material support to Kahane Chai or any of its designated aliases during the time between the 2003 and 2004 reviews is a collateral consequence that creates an exception to the mootness doctrine. *PMOI II*, 327 F.3d at 1244 n.2. knowingly donating to the FTO – do not violate the FTO's first amendment right

to speak, *see* PMOI II, 327 F.3d at 1244-45 see also Humanitarian Law, 205 F.3d at 1135-36, a point not even Kahane Chai challenges. It follows that the AEDPA's restraints upon Kahane.org do not violate its first amendment right to speak.

D. Religious Discrimination

Kahane.org maintains the State Department discriminated against it upon the basis of religion because the Department in 2003, the first year in which it designated any websites as FTOs, "designat[ed] only Jewish websites, all alleged aliases of Kahane Chai, when other FTOs have websites, and sometimes use those sites for despicable purposes." This claim implicitly assumes websites designated as FTOs are the appropriate universe within which to determine whether there has been discrimination against a particular religion. The petitioners offer no defense of that assumption, we see none, and common sense suggests the appropriate universe for evaluation of a discrimination claim is the complete list of designated FTOs, which, as the petitioners acknowledge, includes many non-Jewish organizations. Consequently, we find no evidence of religious discrimination at work in the designation of Kahane.org.

III. Conclusion

For the foregoing reasons, we hold the Secretary's 2003 redesignations of Kahane Chai and Kach, and his designation of Kahane.org, were based upon substantial support in the record and did not violate the petitioners' constitutional rights. Accordingly, the petition for review is

Denied.

APPENDIX B – ORDER DENYING REHEARING

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1392 September Term, 2006

Filed On: January 19, 2007

[1017489]
Kahane Chai, et al.,
Petitioners,

v.

Department of State and Condoleezza Rice, Secretary of State,
Respondents.

BEFORE: Ginsburg, Chief Judge, and Sentelle, Circuit Judge, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing filed December 1, 2006, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: s/_____
Michael C. McGrail
Deputy Clerk

APPENDIX C – ORDER DENYING REHEARING EN BANC

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1392 September Term, 2006

Filed On: January 19, 2007

[1017488]
Kahane Chai, et al.,
Petitioners,

v.

Department of State and Condoleezza Rice, Secretary of State,
Respondents.

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk
BY: s/_____
Michael C. McGrail
Deputy Clerk